Supreme Court, U.S.
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No. 94-1175

IN THE

Supreme Court United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.
an Illinois Banking Corporation,
Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that section 611 of the Expedited Funds Availability Act did not confer federal jurisdiction over this check collection dispute between two Illinois depository institutions.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Midwest Bank & Trust Company, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 30 F. 3d 64.

OPINION BELOW

The opinion reproduced in the Appendix to the Petition for a Writ of Certiorari at App. 1-3 differs from the opinion which is reported at 30 F.3d 64. On July 11, 1994 the Court of Appeals filed an opinion. On September 20, 1994, after a petition for rehearing and briefs *amici curiae* in support of that petition had been filed, the Court of Appeals amended its initial opinion. The opinion reproduced in the Appendix to the petition does not reflect the September 20, 1994 amendment. The opinion reported at 30 F.3d 64 is the amended version and specifically states that it is the opinion "as amended on Denial of Rehearing September 20, 1994." *Id.* The opinion as amended and reported at 30 F.3d 64 is printed at pages A1-A4 in the Appendix to this brief.

STATUTES

In addition to the statutory provision contained in the petition, the following statutory provision is involved:

810 ILCS 5/4-103

§4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operation circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or non-action approved by this Article or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearing-house rules and the like or with a general banking usage nor disapproved by this Article, is prima facie the exercise of ordinary care.

* * * *

REASONS FOR DENYING THE WRIT

I.
THE DECISION OF THE COURT OF APPEALS DOES NOT DEPRIVE DEPOSITORY INSTITUTIONS OF A FORUM FOR RESOLVING THE TYPE OF DISPUTE INVOLVED IN THIS CASE

The present case involves a dispute between two Illinois banks. Petitioner asserts that the Expedited Funds Availability Act ("EFAA") and regulations promulgated under it create federal jurisdiction over its claim that respondent was negligent in the return of a check drawn on insufficient funds. Petitioner recognizes that prior to the EFAA there was no federal jurisdiction over such disputes. Nevertheless, attacking the unamended version of the opinion rather than the amended version of the opinion which is reported at 30 F.3d 64, petitioner incorrectly argues that the Court of Appeals decision will "wreak havoc" by depriving depository institutions of a forum for resolving such disputes. (petition pp. 7-8). The Court of Appeals, however, amended its decision to make clear that it was not depriving depository institutions of the judicial forum that has been, and continues to be, used to resolve similar disputes.

A.
FEDERAL RESERVE REGULATIONS ARE INCORPORATED INTO THE UNIFORM COMMERCIAL CODE AND ENFORCEABLE IN STATE COURTS

Regulation CC (12 C.F.R. Part 229) is incorporated into the Uniform Commercial Code ("UCC") by section 4-103 of the UCC (810 ILCS 5/4-103). Section 4-103(a) of the UCC provides that: "[t]he effect of the provisions of this article may be varied by agreement . . . ." UCC section 4-103 (b) provides: "Federal Reserve regulations and operating circulars, clearing house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled." Subsection (c) provides that "action or non-action . . . pursuant to Federal Reserve regulations or operating circulars constitutes the exercise of ordinary care . . . ." Thus, as the Court recognized in *Appliance Buyers Credit Corp v. Prospect National Bank*, 505 F. Supp. 163, 164 (C.D. Ill. 1981) *Aff'd* 708 F.2d 290 (7th Cir. 1983), by its own terms the UCC is modified by Federal Reserve regulations and therefore, under state law the rights and duties of the banks in disputes such as this are governed by the Federal Reserve regulations. Also see *e.g. United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990), where the Court applied 12 C.F.R. § 210 through UCC § 4-103. *Id.* 784 S.W. 2d at 908 N. 4.

B.
THE COURT OF APPEALS AMENDED ITS DECISION IN RESPONSE TO THE BRIEFS FILED IN SUPPORT OF THE PETITION FOR REHEARING

Disputes similar to the dispute involved in the present case have been decided by state courts under the UCC (which incorporates the federal regulations). *See e.g. United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990).[1] However, under the initial version of the opinion it may have been unclear whether the Court intended to foreclose state courts from hearing such disputes. It was in that context that the Federal Reserve Board filed a brief in support of the petition for rehearing. At pages 7-8 of the petition there is an abridged quotation from page 3 of the Board's brief. That statement at page 3 of the Board's brief states in pertinent part:

> The administrative forum hypothesized by the panel does not exist within any of the financial institution regulation agencies responsible for enforcing the EFA Act, *and the panel decision even calls into question state court jurisdiction over EFA Act interbank check collection actions*. Accordingly, the decision leaves payment system participants without a forum for vindication of their EFA Act causes of action, and casts doubt upon the availability of any single forum for the resolution of check payment system disputes.

[1] When diversity jurisdiction existed they have also been decided by Federal Courts. *See e.g. Appliance Buyers Credit Corp. v. Prospect National Bank of Peoria*, 708 F.2d 290 (7th Cir. 1982); *Marcoux v. Van Wyk*, 572 F.2d 661 (8th Cir. 1978).

(Emphasis added to the portion omitted from the quotation in the petition). Similarly, the quotation at page 12 of the petition is from a brief directed to the initial decision of the Court of Appeals rather than the amended version which is reported.

The amended version of the opinion cures, or at the very least, substantially ameliorates the concerns raised in the quoted portions of the amicus briefs filed in support of rehearing. In response to those briefs, the Court of Appeals amended its opinion to make clear that depository institutions may present their claims in the state court. However, as the court also pointed out, the fact that no mechanism is currently available for administrative resolution of such disputes cannot confer federal jurisdiction. *Id.* 30 F. 3d at 65, A3.

II.
THE COURT OF APPEALS DECISION IS CORRECT

The sole issue presented by the petition is whether section 611 of the Expedited Funds Availability Act ("EFAA") (12 U.S.C. § 4010) created federal jurisdiction over this check collection action between two Illinois depository institutions. The Court of Appeals correctly held that section 611 does not confer federal jurisdiction in this case.

Section 611(a) of the EFAA creates a cause of action against depository institutions for failure to comply with the EFAA or regulations prescribed under it. That section, however, specifically excludes from that cause of action disputes such as the present case. It expressly

excludes disputes between two depository institutions. Regulation CC is promulgated under the authority of section 611(f) and those regulations are therefore included in the cause of action in section 611 (a). Thus, if petitioner were not a depository institution, section 611(a) would create a cause of action, and section 611(d) would confer federal jurisdiction because it then would be an action created by section 611(a).

Petitioner and respondent, however, are both depository institutions. Petitioner's claim is therefore expressly excluded from the cause of action created under section 611(a). Thus, the Court of Appeals correctly concluded that section 611(d) does not confer federal jurisdiction.

Despite Congress' express exclusion of actions between two depository institutions in section 611(a), petitioner appears to argue that because Congress has delegated to the Federal Reserve Board the authority to promulgate regulations under section 611(f), it has somehow by implication delegated to the Board the authority to confer federal jurisdiction. Petitioner's position is incorrect. It would negate Congress' express exclusion of disputes between two depository institutions. It also is contrary to the basic principle that: "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School District*, 475 US 534, 541, 89 L. Ed. 2d 501, 511 (1986). "[S]tatutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction". *Boelens v. Redman Homes, Inc.*, 748 F. 2d 1058, 1067 (5th Cir. 1984); *also see, Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988).

The Federal Reserve Board does not have the power to confer federal jurisdiction. The Court of Appeals was correct in holding that Congress has not conferred federal jurisdiction over EFAA disputes between two depository institutions.

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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FIRST ILLINOIS BANK & TRUST, an Illinois Banking Corporation,
Plaintiff-Appellee,
v.
MIDWEST BANK & TRUST COMPANY, an Illinois Banking Corporation,
Defendant-Appellant.

No. 93-3251

United States Court of Appeals,
Seventh Circuit.

Argued April 13, 1994.

Decided July 11, 1994.

As Amended on Denial of Rehearing Sept. 20, 1994.

Before CUMMINGS, EASTERBROOK and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

In April 1992 plaintiff First Illinois Bank & Trust ("First Illinois") filed an amended complaint against Midwest Bank & Trust Company ("Midwest") complaining that Midwest returned a $64,294.27 check unpaid and negligently failed to advise First Illinois that the check was NSF (Not Sufficient Funds). First Illinois claimed Midwest violated its duty under Regulation CC (12 CFR part 229) to give a reason for returning a check unpaid. 12 CFR §§ 229.30(d), 229.33(b)(8).

Pursuant to 12 CFR § 229.38(a), First Illinois sought to recover damages resulting from Midwest's alleged negligence. Subsequently Judge Kocoras granted First Illinois' motion for summary judgment, simultanteously denied summary judgment to Midwest, and entered judgment for First Illinois for $43,912.06, the claimed amount of its loss. The district court found that Midwest had breached the standard of care imposed by Regulation CC by returning the check without advising First Illinois that the check was NSF. Midwest thereafter appealed from the judgment below.

At the April 13, 1994, oral argument in this Court, we questioned whether the district court had jurisdiction over this controversy and ordered both parties to file memoranda concerning that question. We now hold that the district court had no such jurisdiction.

Jurisdiction is supposedly granted under the Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010), in particular by 12 U.S.C. § 4010, titled "Civil liability," Subsection (d) ("Jurisdiction") provides that "any action under this section may be brought in any United States district court...." 12 U.S.C. § 4010(d). But subsection (a) ("Civil liability") limits the application of the section to certain disputes between "any depository institution" and "any person other than another depository institution." 12 U.S.C. § 4010(a). Because the parties concede that both First Illinois and Midwest Bank are "depository institutions" within the meaning of the Expedited Funds Availability Act, 12 U.S.C. § 4001(12), we have no jurisdiction over this dispute.

Disputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) (or perhaps in state court). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.

The purpose of the Expedited Funds Availability Act is to require banks to make funds available to depositors quickly. Thus the depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings.

The judgment below is vacated and the action is remanded to the district court with instructions to dismiss it for want of jurisdiction.

ORDER

Sept. 20, 1994

The opinion dated July 11, 1994, is hereby amended by substituting the following paragraph for the last paragraph on page 65:

> [Editor's Note: Amendment incorporated for purpose of publication.]

On August 25, 1994, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc*. On August 29, 1994, by leave of Court, the Board of Governors of the Federal Reserve System, the New York Clearing House Association and the Standard Bank and Trust Company filed briefs *amici curiae* in support of the petition for rehearing.

No judge in active service has requested a vote on the suggestion for rehearing *en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.